

January 7, 2008

The Honorable Mayor Mike Anderson
Members of the City Council
City of Lafayette
3675 Mt. Diablo Blvd. #210
Lafayette, CA 94549

Re: Correspondence from Sam Holmes regarding Pending Palo Alto Drive Quiet Title Litigation

Dear Mayor Anderson and Members of the City Council:

We are longstanding Lafayette residents and the holders of the legal right to purchase the 2 contiguous legal parcels described as the 9.25 acre vacant parcel (APN 244-300-001), owned by Jim and Nanna Busby and a .12 acre parcel (APN 244-022-005), owned by Security Owners Corporation. The purpose of this letter is to respond to the tactics and misstatements recently advanced by the Holmes' and Kathy Merchant at your December 19, 2007 public hearing regarding this complex matter.

Our families are actively involved in the Lafayette community. As such, it has been particularly important to us that we work collaboratively with the adjoining property owners and City Staff to resolve this matter. Since 2001, we have met with City Staff, outreached to neighbors, and made presentations to homeowner groups in efforts to resolve this longstanding access issue. Over a year ago, we submitted a pre-HDP Application to the Planning Commission, along with the attached letter that details our community outreach efforts. The Planning Commission concluded that they did not have jurisdiction over the matter and suggested a judicial determination is necessary to resolve this access issue and the Holmes' prescriptive claims. Following the Commission's direction, a quiet title action against the Holmes was filed in Contra Costa Superior Court by the legal owners of these parcels.

We had intended to remain on the sidelines while this straightforward quiet title action played out. However, the Holmes', faced with the prospect that California courts will not ignore fundamental property rights, requested the City to become supporters and involved in this private action. They have resorted to three divisive tactics that are often employed when the facts and law are not on your side: 1) threaten the City with a lawsuit if it doesn't side with your position; 2) attempt to get the City Council to reject the advice of its own highly regarded City Attorney; and 3) demonize their opponents as lacking moral standing, among other faults.

We urge the Council to reject these tactics. Instead of wading into the proposed legal misadventures, it would make more sense for the City Council to allow the judicial process to play out. Following the quiet title action ruling and receipt of our application, we are confident that the City Council will exercise its leadership by attempting to balance the interests of the parties.

In light of the misstatements recently made to this Council, we are compelled to respond for the record to this request by the Holmes'. To do otherwise could leave Councilmembers thinking some of the accusations and creative theories were credible. To correct the record, please consider the following:

- Since 2001, we met on numerous occasions with former City Attorney Charles Williams, along with Ann Merideth, Niroop Srivatsa and others to discuss the access issue. In these meetings, Mr. Williams was careful and clear that as a general principle, the City never disputed the right to build one home on a legal parcel. He and Staff urged us to attempt good faith efforts to negotiate an alternative access with homeowners on Quail Ridge, Toledo, or Palo Alto. (We took this sound, consensus-seeking advice, and our 3-4 year efforts have been well documented by us and your City Staff). Mr. Williams never opined that a memo or letter restating a Tentative Map condition ever rose to the level of a City Attorney "ruling" or even a legal opinion on the access issue. In fact, Mr. Williams has indicated that he has not performed legal research on the distinctions between tentative maps and final maps as it applies to the facts of this matter. Finally, he never opined whether the owner of the 9.25 acre legal parcel had legal access to Palo Alto. As a result, the recent presentation to you mischaracterizes the actions of your former City Attorney over 30 years ago, and it is inaccurate to imply that the legal conclusions of your current City Attorney are at odds with your former City Attorney.
- Similar to the advice of your current City Attorney, Mr. Williams sought to protect the City by recognizing well settled law and compelling public policy against land locking legal parcels. The April 20 2006 Staff Report states: ***"The Staff cannot land lock a developable parcel of land and must approve access to the same."***
- As further recognized in the April 20, 2006 Staff Report, Final Maps are recorded and lasting reflections of binding agreements; *tentative maps are not*. As your City Attorney and planner have already identified and analyzed, the Final Map only relinquished abutter's rights on Toledo, not Palo Alto. Therefore, City Staff has correctly concluded: ***"However, these conditions, specifically no development until there is vehicular access off of Cambridge Road and the relinquishment of access rights from Palo Alto Drive did not survive as they were never included in the final map or separate agreement."*** Once the Final Map is approved, the Tentative Map is of no further force or effect. Mrs. Merchant's effort blur this critical distinction between tentative maps and final maps would reinvent basic Subdivision Map Act law and practice.
- Whether the restrictive portion of one Tentative Map condition was intentionally omitted from the Final Map out of respect for the legal title and ownership of Security Owners, or was an oversight, is immaterial at this point. Contrary to the "transparency" claims, the Final Map process was open and public. Open government policies respect established legal rules and process. Final maps are agendized before city councils for a reason: a City Council publicly learns that its Staff has made its ministerial determination that the Final Map "substantially conforms" to the Tentative Map and its conditions. The request before you is attempting, 32 years late, to recharacterize the clear language on the face of a Final Map which was open to public scrutiny and review.

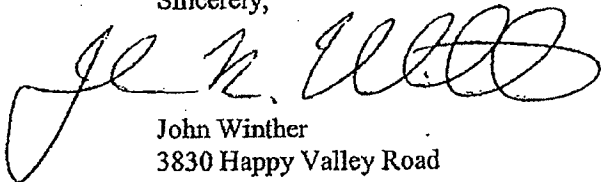
Good government and State law call for finality and certainty. The Subdivision Map Act provides a 90 day period to object to a Final Map, not a 32 year challenge period.

- We are not surprised that immediate neighbors would want to treat this large parcel as if it had been acquired for private open space purposes and want a private park bordering their backyards. Our research of the public records indicates there was never a question about whether the property would become permanent open space. The record shows that up to two to three home sites were contemplated and the only real question was the optimal point of access. Now, after years of effort to identify a good solution, it's apparent that these homeowners want no development on this large vacant parcel which abuts their backyards. It's also clear that our conciliatory approach of only seeking access for one home is unsatisfactory.

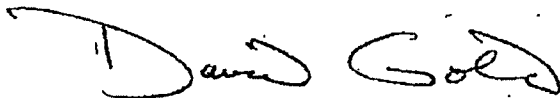
As City Staff is aware, there is an approximately one acre natural plateau home site towards the westerly portion of the 9.25 acre site. We are proposing a single home on this site which would be largely screened from the Palo Alto neighbors. Once this pending quiet title action is resolved, we look forward to engaging in constructive discussions with the City to address design, siting and mitigation issues. In the meantime, for the reasons identified in this letter, we urge the City to take the responsible and reasoned approach of allowing the judicial process to proceed without the City's involvement, notwithstanding express threats of litigation from these neighbors.

Thank you for your consideration of our position.

Sincerely,



John Winther
3830 Happy Valley Road
Lafayette



David Gold
4020 Natasha Drive
Lafayette

cc: Malathy Subramanian, City Attorney
Niroop Srivatsa, Planning and Building Manager
Joanne Robbins, City Clerk

Attachment

March 21, 2006

Niroop Srivatsa
Planning and Building Manager
3675 Mt. Diablo Blvd. Suite 210
Lafayette, CA 94549

Re: 9.4 Acre Property (APN 244-022-005, APN 244-300-001)
Application for Planning Commission Access Determination from
Palo Alto Drive

Dear Niroop:

As you know, for over four years, we have had numerous discussions with you and other Lafayette Staff members in an effort to determine whether there were any feasible alternatives to our existing legal access to the approximately 9.4 acre property located between Palo Alto Drive to the north, Quail Ridge Road to the south, Toledo Drive to the east and Cambridge Court to the west.

When we first met with you, Ann Merideth and Charlie Williams back in 2001, City Staff encouraged us to explore all alternatives with neighbors to see whether we could amicably resolve the access to the site. We are two Happy Valley residents who have lived in Lafayette for a combined 25 years and whose children attend Happy Valley School and Stanley Middle School. We felt it was critically important to be sensitive to our neighbors' concerns because of our commitment to the Lafayette community. As such, we worked extremely hard to listen to neighbors, meet with adjacent homeowners groups, coordinate our efforts with City Staff, and investigate title alternatives. Based on our extensive outreach efforts, as documented in the attached chronology, we have exhausted all reasonable efforts to find an alternative access to our existing legal access from Palo Alto Drive.

After years of unsuccessfully trying to secure alternative access arrangements, we are requesting the Commission's confirmation of our Palo Alto access in advance of subsequently filing a Hillside Development Permit ("HDP"). We understand that this request is not a planning determination and that the City and other interested parties will have the opportunity to subsequently evaluate other planning and design issues as part of a properly noticed HDP process. We believe that our good faith efforts, coupled with the longstanding legal access from Palo Alto Drive and the unique history of this property, as briefly outlined below, supports this access confirmation.

- Approximately 30 years have passed since the City's May 6, 1976 approval of Tentative Map 4747, which included the large parcel identified as Parcel 15. Condition 7 to the old Tentative Map addressed access and contemplated that the applicant would simply be able to obtain vehicular access from Cambridge Court over private property owned by their neighbors, the Sandlers. While this was the hoped for outcome, as the attached chronology indicates, over 30 years have passed and the Sandlers have always maintained that they are not interested in any negotiations to allow access over their private property from Cambridge Court.
- Tentative Map Condition 7, also anticipated that the access rights from Palo Alto Drive would be relinquished to the City. However, 1 year later, on March 21, 1977, when the City approved the Final Map (and the Tentative Map and its conditions were extinguished), the Final Map provided no restrictions on the legal access from Palo Alto Drive. The attached Chicago Title title report confirms there is a separate fee title legal parcel connecting the former Lot 15 to Palo Alto Drive.
- The Final Map also only referred to the applicant's relinquishment of abutters rights to Toledo Drive, "a City Street." However, the City never accepted dedication of Toledo Drive, which has remained a private street owned by the Happy Valley Estates Homeowners Association.
- The March 10, 1977 Subdivision Improvement Agreement entered into at the time of the City's Final Map approval, also omitted any surviving restrictions on the fee title access parcel from Palo Alto Drive.

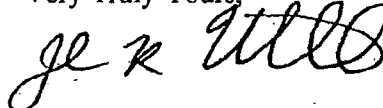
Attached to this letter is our application and related documents seeking the Planning Commission's formal determination confirming that we currently hold legal access from Palo Alto Drive to this large property and that we can move forward with an HDP application identifying Palo Alto Drive as the assumed access. This application includes the following:

- Application fee
- Context map
- Application form conforming to the submittal requirements indicated by you and the City Attorney and signed by John Winther and David Gold, as the preparers of the Application supplemental forms. (Also attached is a letter from the current property owner whose corporate entity also owns the separate but contiguous fee title access strip to the site from Palo Alto Drive).

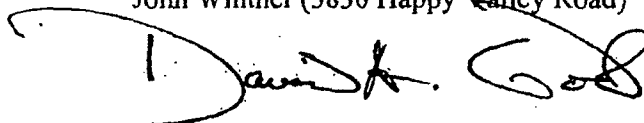
Niroop Srivatsa
March 21, 2006
Page 4

delay any further. Thank you for processing our application to confirm access from Palo Alto Drive to the 9.25 acre parcel.

Very Truly Yours,



John Winther (3830 Happy Valley Road)



David Gold (4020 Natasha Drive)

cc: Malathy Subramanian, City Attorney
Ann Merideth, Community Development Director
Joanne Robbins, City Clerk

Attachments

PALO ALTO DRIVE PROPERTY CHRONOLOGY OF COMMUNITY OUTREACH EFFORTS TO RESOLVE ACCESS

Introduction:

For over 4 years, John Winther and David Gold, two Happy Valley residents, have communicated with and sought input from surrounding neighbors. Our objective was to identify the best access to the site which would minimize the visual and physical impact for the surrounding homeowners.

- December 12, 2001 - Entered into contract for 2 separate legal parcels: the larger approximately 9.2 acre parcel held by Jim Busby and his former wife, and the smaller fee title access strip from Palo Alto held in the name of the Busby's corporation. Property taxes have always been paid on these parcels by the owners.
- Spring 2002 - Present - Met multiple times with Niroop and City Attorney to discuss the entitlement issues. Initially, 2 homes were considered. Now, only 1 homesite is being contemplated for the property. At Staff's request, Winther/Gold expended substantial efforts to meet with neighborhood groups.

Cambridge Court:

- February 28, 2002 - Left letter in mailbox seeking to meet with the Sandlers. (See attached.)
- March 19, 2002 - Telephone conversation with Mr. Herbert Sandler to explore possibility of gaining access off Cambridge Court. Was told: "...in the past we thought long and hard about granting access and determined we are not interested."
- August 11, 2003 - Mailed second letter to Mr. Herbert Sandler to revisit the possibility of purchasing access from Cambridge Drive. (See attached letter.)
- In follow-up call to Mr. Sandler, he politely reaffirmed that they were not interested in allowing access through their property. Price was not an issue; they simply had no interest in discussing any proposal.

Palo Alto Drive:

- Spring 2002 - Present - Commenced neighborhood outreach program by meeting with some of the adjacent property owners, including the Merchants, Holmes, Clevelands and a few other families along Palo Alto Drive. We described our

plans and alerted them that we would evaluate alternative access routes into the property.

Toledo Drive:

- January - May 2004 - Conducted numerous telephone conversations and face-to-face meetings with Dan Weiner, the President of the 14-member Happy Valley Estates Homeowners Association. This Association is responsible for Toledo Drive and the tennis facilities. The purpose of the meetings was to explore the possibility of purchasing access through Toledo Drive, a private road and having the 9.2 acre parcel become subject to the Association.
- Spoke to Bairds, McQuains; suggested possible offers based on engineering surveys, studies indicating Toledo Drive access to site.
- Mailed a letter and placed a call to Uchidas to explore the possibility of gaining access through their private drive. They declined our request.
- May 2004 - Invited to make a presentation to the Happy Valley Estates Homeowners Association annual meeting and proposed initiating the driveway entrance on Toledo Drive. In exchange for allowing us access, we offered to provide approximately \$50,000 funding for capital improvements, which included paving repairs along Toledo and enhancements and resurfacing to the common tennis courts and BBQ facilities. We met with approximately 10 couples for over an hour. The Association indicated they appreciated our proposals and voted 11-2 to terminate all discussions.
- Followed up this rejection by sending Thank You letters to all members. (See attached).

Quail Ridge Road:

- Arranged meetings with Jeff Johnson, 1 of the owners of private Quail Court driveway off Quail Ridge.
- April 24, 2004 - Attended the annual Board of Directors meeting for the 166-resident Happy Valley Highland Improvement Association presided by President Don Thicke. Attended by 50-60 members. John Winther presented the single home site location and described possible access points.
- As follow up to the annual Board meeting, organized a follow up breakfast with Jeff Johnson. The purpose of the meeting was to discuss the possibility of gaining access to the top of the southernmost portion property through his private court.

- Conducted numerous follow up outreach calls with each of the four property owners (Hampton, Konkrells, Brunnes, Johnsons) who own the private court. Was advised that at least 2 of the 4 homeowners would not even entertain any proposal and had no interest in even meeting with us.
- March 10, 2005 - Sent a personal follow up note to each of the four property owners to invite them over to John Winther's Happy Valley home to discuss access through the private court. Most of the people declined to attend and consequently the meeting was cancelled.

August 11, 2003

Mr. Herbert Sandler
1199 Cambridge Drive
Lafayette, CA 94549

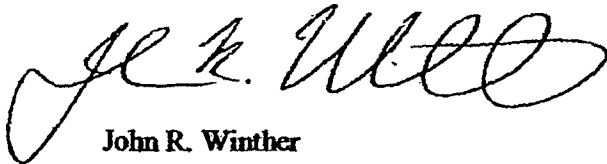
Dear Mr. Sandler,

Approximately a year ago we spoke on the phone about my intent to purchase two undeveloped parcels which share a common boundary with your property on Cambridge Drive. As you may recall, I presently live a few blocks away from you at 3830 Happy Valley Road. You were kind enough to describe some of the challenges you faced with the soils on your site and you also provided some color on the history of the property. I took your comments to heart and subsequently enlisted the help of several consultants to analyze the challenges of the property. In particular, I hired a geotechnical engineer, environmental consultant, civil engineer and a title specialist to address the potential risks of building on the property. Fortunately, the outcome of these studies was positive, and I plan to soon submit an application to the City of Lafayette.

One of the issues I analyzed is the access to the site. I identified a legal and suitable access road, but frankly the more attractive access is from Cambridge Drive. As you know, a portion of your property, which is located a distant point from your home, separates these parcels from Cambridge Drive. When I raised this possibility with you on our prior call, you indicated that you were not interested in selling an access from Cambridge Drive.

An important aspect of my research on the property was to meet with many of the surrounding homeowners to discuss my plans and to identify any potential concerns or sensitivities. The purpose of my letter is to suggest a short follow-up meeting for me to introduce myself to you, describe my plans and to revisit the possibility of purchasing access across your property from Cambridge Drive. I will follow-up with a call in hope of scheduling a time to see you and your wife.

Sincerely,

A handwritten signature in black ink, appearing to read "John R. Winther". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Winther" following in a similar style.

John R. Winther

JOHN R. WINTHER

3/10/05

DEAR JEFF,

AS A FOLLOW-UP TO OUR PHONE CONVERSATION SEVERAL WEEKS AGO, I CONTACTED YOUR OTHER NEIGHBORS TO INTRODUCE MYSELF AND DESCRIBE MY PLANS FOR THE PROPERTY AT THE END OF YOUR PRIVATE DRIVE. THE PURPOSE OF MY LETTER IS TO INVITE YOU TO MY HOME LATE THIS MONTH FOR A CUP OF COFFEE, SO THAT I CAN SHOW YOU THE PLAN AND PROVIDE YOU MORE DETAIL. I LIVE ON 3830 HAPPY VALLEY ROAD AND I DOUBT THE MEETING WOULD LAST MUCH LONGER THAN A HALF HOUR. SINCE IT CAN BE DIFFICULT TO COORDINATE DIFFERENT SCHEDULES, I WILL PROPOSE A COUPLE OF ALTERNATIVE TIMES. I AM HOPEFUL WE COULD MEET AT 7:30 PM ON ONE OF THE FOLLOWING DATES: MARCH 29, 30 OR 31ST. I WILL FOLLOW-UP WITH A PHONE CALL TO YOU LATER THIS WEEK TO CHECK ON YOUR AVAILABILITY.

BEST REGARDS,

J. R. Wintner

JOHN R. WINTHER

3/10/05

DEAR SCOTT,

AS A FOLLOW-UP TO OUR PHONE CONVERSATION A FEW WEEKS AGO, I CONTACTED YOUR OTHER NEIGHBORS TO INTRODUCE MYSELF AND DESCRIBE MY PLANS FOR THE PROPERTY AT THE END OF YOUR PRIVATE DRIVE. THE PURPOSE OF MY LETTER IS TO INVITE YOU TO MY HOME THIS MONTH FOR A CUP OF COFFEE, SO THAT I CAN SHOW YOU THE PLAN AND PROVIDE YOU MORE DETAIL. I LIVE ON 3830 HAPPY VALLEY ROAD AND I DOUBT THE MEETING WOULD LAST MUCH LONGER THAN A HALF HOUR. SINCE IT CAN BE DIFFICULT TO COORDINATE DIFFERENT SCHEDULES, I WILL PROPOSE A COUPLE OF ALTERNATIVE TIMES. I AM HOPEFUL WE COULD MEET AT 7:30 PM ON ONE OF THE FOLLOWING DATES: MARCH 29, 30 OR 31st. I WILL FOLLOW-UP WITH A PHONE CALL TO YOU LATE THIS WEEK TO CHECK ON YOUR AVAILABILITY.

BEST REGARDS,

J. R. Wintner

John R. Winter

Best Regards,

As a follow-up to our recent phone conversation, I contacted your other neighbors to introduce myself and describe my plans for the property at the end of your private drive. The purpose of my letter is to invite you to my home later this month for a cup of coffee, so that I can show you the plan and provide you with more detail. I live on 3830 Happy Valley Road and I doubt the meeting would last longer than a half hour. Since it can be difficult to coordinate different schedules, I will propose a couple of alternative times. I am hopeful we could meet at 7:30 PM on one of the following dates: March 29, 30 or 31st. I will follow-up with a phone call to you later this week to check on your availability.

Dear Mr. Levenson,
3/10/05

JOHN R. WINTER

JOHN R. WINTHER

DEAR MR. BRUNNER,

3/10/05

As a follow-up to our recent phone conversation, I contacted four other neighbors to introduce myself and describe my plans for the property at the end of your private drive. The purpose of my letter is to invite you to my home later this month for a cup of coffee, so that I can show you the plan and provide you more detail. I live on 3830 Happy Valley Road and I doubt the meeting would last longer than a half hour. Since it can be difficult to coordinate different schedules, I will propose a couple of alternative times. I am hopeful we could meet at 7:30 PM on one of the following dates: March 29, 30 or 31st. I will follow-up with a phone call to you later this week to check on your availability.

BEST REGARDS,

